SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 1056

SAM RATNER and GARY CLARENCE MORTON,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the Appellate Division of the Superior Court for the State of California, County of San Mateo.

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THE PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the Appellate Division of the Superior Court for the State of California, County of San Mateo.

Petitioners, Sam Ratner and Gary Clarence Morton do respectfully pray for a Writ of Certiorari to the Appellate Division of the Superior Court for the State of California, County of San Mateo to review its judgment affirming the judgment of conviction of the Municipal Court for the Southern Judicial District, County of San Mateo, State of California, by which petitioners were sentenced as follows:

"Sam Ratner:—Pay fine in the sum of $1,000.00 plus $100.00 State Assessment and three years summary probation on condition fine is paid in full, and six (6) months in San Mateo County Jail—suspended on total payment of fine and acceptance of summary probation. Gary Clarence Morton:—Pay fine in the sum of $500.00 plus $50.00 State assessment and one year summary probation on condition fine is paid in full and three (3) months

in San Mateo County jail—suspended on total payment of fine and acceptance of summary probation."

Opinions Below.

Trial in the Municipal Court, Southern Judicial District. County of San Mateo was by jury.

The opinion and judgment of the Appellate Division of the Superior Court of the State of California for the County of San Mateo is appended hereto as Appendix "A". The said opinion and judgment was not published.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed is March 31, 1965. The time of entry of judgment is March 31, 1965.

2. Petitioners were convicted of the charge contained in Count 5 of a five count complaint after jury verdict, which verdict was returned on July 7, 1964, and judgment thereon was entered on July 21, 1964, in the Municipal Court, Southern Judicial District, County of San Mateo, State of California, in the case captioned The People of the State of California, Plaintiff v. Sam Ratner and Gary Clarence Morton, Defendants, and numbered 62M52.

The petitioners then filed a timely notice of appeal to the Appellate Division of the Superior Court for the State of California, County of San Mateo.

On March 31, 1965, the Appellate Division of the Superior Court of the State of California, County of San Mateo, filed its decision and judgment.

Thereafter, petitioners filed a timely petition for rehearing and application for certification to the District Court of Appeals under the provisions of Rule 63 of the Rules on Transfer of Municipal and Justice Court appeals adopted by the Judicial Council of the State of California, effective January 2, 1962, appended hereto as Appendix "B". On April 16, 1965, the Appellate Division of the Superior Court of the State of California for the County of San Mateo denied the petition for rehearing and did deny the petitioner's application for certification to the District Court of Appeals. That denial is appended hereto as Appendix "C". The Appellate Division of the Superior Court of the State of California for the County of San Mateo thereby became the "highest court of a state in which a decision could be had" (28 U.S.C.A. §1257).

Under the law of the State of California, a convicted defendant charged with a misdemeanor in the Municipal Court of the State of California may appeal to the Appellate Department of the Superior Court, as a matter of right. California Penal Code §1466, California Constitution, Article VI, §§ 4, 4b and 5.

No further appeal is permitted under California law, unless done pursuant to the provisions of California Rules of Court, Chapter II, Rules on Transfer of Municipal and Justice Court Appeals, Rule 63 (see Appendix "B"). Application was made pursuant to said provision (appended herein as Appendix "G") and was denied as aforesaid (see Appendix "C"), thereby rendering the Appellate Division of the Superior Court of the State of California for the County of San Mateo the "highest court of a state in which a decision could be had." *Edwards v. People,* 314 U.S. 160, 171, 62

S. Ct. 164, 165, 86 L. Ed. 119; *Smith v. People*, 361 U.S. 147, 148, fn. 2, 80 S. Ct. 215, 216, fn. 2; *Alberts v. California*, 354 U.S. 476, 481, fn. 6, 77 S. Ct. 1304, 1307, fn. 6.

3. The statutory provision which confers jurisdiction upon this court to review the judgment in question by Writ of Certiorari is 28 U.S.C.A. §1257(3).

Question Presented for Review.

Is the motion picture "Honey Bee" (the film which was the subject of Count 5 wherein petitioners were convicted) obscene, or was it entitled to the protection of the First Amendment of the United States Constitution?

Constitutional Provisions and Statutes Involved.

Involved are the First and Fourteenth Amendments to the United States Constitution; Section 311(a) of the California Penal Code, Section 311.2 of the California Penal Code; Section 1466 of the California Penal Code; and California Constitution, Article VI, Sections 4, 4b and 5.

Statement of the Case.

Petitioners were charged in a five count complaint with distributing obscene material in violation of California Penal Code Section 311.2. After jury trial, petitioners were found guilty on Count 5, and were acquitted on the first four counts.

The alleged obscene material charged by Count 5 was an 8 millimeter motion picture film entitled "Honey Bee".

The Federal question as to whether the film "Honey Bee" is entitled to the protection of the First Amendment of the United States Constitution was first raised

in the trial court by petitioners' (defendants below) plea of not guilty to the said five count complaint. The definition of obscenity contained in California Penal Code §311(a) and the definition of obscenity enunciated in *Roth v. United States,* 354 U.S. 486, 77 S. Ct. 1304, are exactly similar. By reason of petitioners' conviction on Count 5, it was implicit in that judgment that the film "Honey Bee" constituted obscene material not only under California State Law but also under the definition of obscenity contained in *Roth v. United States, supra;* and was thereby declared not to be entitled to the protection of the First Amendment of the United States Constitution.

Thereafter, petitioners appealed the conviction to the Appellate Division of the Superior Court of California for the County of San Mateo. In petitioners' (defendants-appellants below)

> "designation of record on appeal and statement on appeal (set out hereinafter as Appendix "E") at page two, thereof, petitioners stated their ground for appeal as follows:
>
> "The grounds upon which defendants rely:
>
> I
>
> The motion picture film 'Honey Bee' upon which defendants were convicted in Count 5 of the complaint, is not obscene as a matter of law, but rather is constitutionally protected material."

Petitioners also raised and presented the Federal question to the Appellate Division of the Superior Court of the County of San Mateo at page 4 of their "Appellants' Opening Brief" (set out hereinafter as Appendix "F"), wherein appellants contended:

> "Penal Code §311.2 proscribes only obscene matter. If the underlying matter is not obscene, then

no matter what else it might be, no crime has been committed, and the material is then protected by the First Amendment to the Constitution of the United States and Article I, §9 of the Constitution of the State of California."

On March 31, 1965, the Appellate Division of the Superior Court of the State of California for the County of San Mateo affirmed the judgment of conviction by the Municipal Court, Southern Judicial District, County of San Mateo (see Appendix "A"). The sole issue raised and decided on that appeal was whether the film "Honey Bee" was obscene under the First Amendment of the United States Constitution and under applicable California law.

Thereafter, petitioners sought to have the said Appellate Division decision reviewed by the California District Court of Appeals.

In petitioners' "Petition for Rehearing and Application for Certification to the District Court of Appeals" (set forth hereinafter as Appendix "G"), petitioners again brought to the attention of the Appellate Division the Federal question involved by stating at page 1 thereof as follows:

"(a) The transfer of the instant case is necessary to secure uniformity of decision in that this court's memorandum decision filed March 31, 1965 is contrary to the law of the State of California as expressed in *Zeitlin v. Arnebergh*, 59 Cal. 2d 901; is contrary to the test of obscenity as contained in the Penal Code of the State of California, §311 (a); and is contrary to the law of the United States of America as expressed in *Roth v. United States*, 354 U.S. 386; *One, Inc. v. Olesen*,

355 U.S. 371; *Times Film Corp. v. Chicago*, 355 U.S. 35; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372; *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Jacobellis v. Ohio*, 84 S.Ct. 1676; *Tralins v. Gerstein*, 84 S.Ct. 1903; *Grove Press v. Gerstein*, 84 S.Ct. 190; *Winters v. New York*, 68 S.Ct. 665, and *Burstyn, Inc. v. Wilson*, 72 S.Ct. 77.

(b) To settle important questions of law involving the constitutional guarantees of freedom of speech and expression as contained in the United States Constitution, First and Fourteenth Amendments and the California Constitution, Art. I, Section 9."

The petitions for Rehearing and Application for Certification to the District Court of Appeals were denied on April 14, 1965 (see Appendix "C").

Description of Film "Honey Bee."

The film "Honey Bee" is a 200 ft. black and white 8 millimeter motion picture.

The film opens depicting a young lady, fully clothed, sitting on a couch.

The subject then proceeds to disrobe. She does not perform what is commonly called a striptease, but performs normal acts necessary to remove clothing.

After removing her clothing, the subject poses by lying down, sitting up, leaning back, and turning. The subject does not dance, gyrate, nor perform any sensuous movements.

At no time are the subject's private parts exposed to view nor does the camera focus on the subject's pubic

area. The subject does not at any time touch herself and no other person ever appears in the film with the subject.

The film is best described, in this writer's opinion, as a nude figure study, rather than anything else.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

Certiorari Should Be Granted Because It Is the Announced Duty of This Honorable Court to Review All Decisions Wherein the Substantial Question of Free Expression Under the First Amendment of the United States Constitution Is Presented.

Petitioners rely on this Court's announced position with regard to the singular importance of ceaseless vigilance to safeguard and uphold the constitutional guarantee of free expression under the First Amendment of the United States Constitution. *Roth v. United States,* 354 U.S. 476, 488, 77 S. Ct. 1304, 1311.

As this Court stated most recently in *Jacobellis v. Ohio,* 378 U.S. 184, 188, 84 S. Ct. 1676, 1678:

> "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth v. United States,* supra 354 U.S., at 497-498, S.Ct., at 1315-1316 (separate opinion). Such an issue, we think, must ultimately be decided by this court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment in-

volved in every obscenity case.' Id., 354 U.S., at 498, 77 S.Ct., at 1316, see *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S.Ct. 1432, 1437, 8 L.Ed. 2d 639 (opinion of Harlan, J.)".

and at page 1679, the Court stated:

"Hence we reaffirm the principle that, in obscenity cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

This Court has held that expression in the form of motion picture films is also within the ambit of the First Amendment guarantees. *Jacobellis v. State of Ohio, supra.*

Petitioners most respectfully contend that these paramount and precious rights so derived should never be left with a local court their final arbiter. These First Amendment rights demand a constitutional judgment of the most sensitive type which must, when required, always be finally adjudicated by the United States Supreme Court.

II.

Certiorari Should Be Granted Because the Highest Court of the State of California in Which a Decision Could Be Had in the Instant Matter Has Decided a Substantial Federal Question (First Amendment, U.S. Constitution) Not in Accord With Applicable Decisions of This Court.

Petitioners contend that independent review by this honorable court is required because the film "Honey Bee", when tested by a proper application of constitu-

tional standards and compared with the subject matter of the following cited cases, is clearly not obscene (see description of film "Honey Bee", *supra*).

Times Film Corp. v. Chicago, 355 U.S. 35, 78 S. Ct. 115;

One, Inc. v. Olesen, 355 U.S. 371, 78 S. Ct. 364;

Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S. Ct. 365;

Kingsley International Pictures Corp. v. Regents, 360 U.S. 685;

Manual Enterprises, Inc. v. Day, 370 U.S. 478;

Jacobellis v. Ohio, supra;

Zeitlin v. Arnebergh, 59 Cal. 2d 901.

Nevertheless, the motion picture "Honey Bee" has been suppressed by the Appellate Division of the Superior Court of the State of California for the County of San Mateo. Petitioners have been convicted and sentenced for disseminating material which clearly cannot constitutionally be proscribed.

Conclusion.

The petition for a writ of certiorari should be granted and the decisions reversed.

Respectfully submitted;

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BURTON C. JACOBSON,
RICHARD A. LAVINE,
Attorneys for Petitioner.

APPENDIX "A."

Memorandum Decision.

In the Superior Court of the State of California for the County of San Mateo, Appellate Division.

The People of the State of California, Plaintiff and Respondent, vs. Sam Ratner and Gary Clarence Morton, Defendants and Appellants. On Appeal — Criminal No. AD 209.

Filed, Mar. 31, 1965.

This is an appeal from a judgment of conviction following a jury trial. The grounds upon which the Appellants rely is that the motion picture film "HONEY BEE," upon which the Appellants were convicted in Count Five of the complaint, is not obscene as a matter of law, but rather constitutionally protected material.

In *Zietlin vs. Arnebough, 59 Cal. 2d 901,* the Supreme Court of the State of California, following decisions of the Supreme Court of the United States, held that the courts are the final arbiters as to whether the involved material is obscene as a matter of law. This we accept and have viewed the picture "HONEY BEE," which is the involved matter in our instant case.

We then review the cases cited by Appellant and Respondent to find the standards and tests for our determination herein. In *Jacobelis vs. Ohio, 84 Supreme Court 1676,* the Supreme Court of the United States attempts to set forth the standards and tests. Here we find six Justices concurring in the reversal of a judgment and three dissenting. The six Justices voting for reversal were unable to agree upon an opinion in support of a decision. Two of the Justices reapply the

test of *Roth vs. United States, 354 U.S. 386;* two take the attitude that there should be no conviction for exhibiting a motion picture as this would abridge the freedom of the press as safeguarded by the First Amendment, which is obligatory upon the states by the Fourteenth Amendment. A fifth Justice states his reasons that under the First and Fourteenth Amendments, criminal laws in this area are Constitutionally limited to hard-core pornography, and he further stated that he did not intend at the time of the rendering of the opinion to find the kinds of material to be embraced in that description and perhaps could never succeed in intelligibly doing so. He does state that he "knows it when he sees it." Another Justice voted for reversal without any opinion.

On the dissenting side, we find two Justices reapplying *Roth,* but they would apply a "sufficient evidence" standard of review. The third dissenting Justice would apply Roth in an amplified way, and "would not prohibit a state from banning any material which, taken as a whole, has been reasonably found in a state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material."

We then turn to the Supreme Court of California and the unanimous decision in *Zietlin.* Their definition of obscenity under Penal Code 311.2, which is the model penal code approved in *Roth,* is that the test is whether the subject material is hard-core pornography utterly without redeeming social importance. This latter type falls without the category Constitutionally protected material.

All of the courts, including ours, do not want to act as censors; however, under all the decisions, there is a right granted to banish that which is obscene under the prevailing test. In *Zietlin* at page 920, the Supreme Court states: "By employing the term 'utterly,' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance. The only material that falls in the latter category is hard-core pornography. This language, indeed, is the language of *Roth;* as we have shown, subsequent Supreme Court decisions, State decisions, and commentators have interpreted to describe hard-core pornography."

We can deal in semantics at great length; however, the best expression is that of Justice Stewart — "When we see it, we know it." In "HONEY BEE" we have seen it and we know it to be obscene and to be hard-core pornography. *Judgment affirmed.*

Dated: Mar. 31, 1965

Edmund Scott, *P. J.*
Louis B. DeMatteis *J.*
Frank B. Blum *J.*

APPENDIX "B."

Rule 63. Certification.

(a) [*Authority to make*] The superior court on application of a party or on its own motion may certify that the transfer of a case to the District Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. Such certification may be made by a majority of the judges of the appellate department, or, in a county having no appellate department, by the judge hearing the appeal. When there was a trial in the superior court, the judge who tried the case may make such certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who heard the appeal or tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court.

APPENDIX "C."

In the Superior Court of the State of California in and for the County of San Mateo, Appellate Division.

Ad No. 209.

Present Hon. Edmund Scott, *P.J.* Hon. Louis B. Dematteis, *J.* Hon. Frank B. Blum. *J.*

The People of the State of California, Plaintiff & Respondent vs. Sam Ratner and Gary Clarence Morton, Defendants and Appellants.

Filed Apr. 15, 1965.

Re: Petition for Rehearing

The petition of the appellants for a rehearing is denied.

The application of the appellants for certification of this case to the District Court of Appeal is denied.

Dated: April 14, 1965.

Edmund Scott, *P. J.*
Louis B. Dematteis, *J.*
Frank B. Blum, *J.*

APPENDIX "D."

Constitution of the United States of America.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code, Sections 311 (a), 311.2.

§311.(a) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

§311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state.

Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeaner.

§1466. Judgments and orders appealable; people; defendant.

An appeal may be taken from a judgment or order of an inferior court, in a criminal case, to the superior court of the county in which such inferior court is located, in the following cases.

1. By the people:

(a) From an order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy;

(b) From a judgment for the defendant upon the sustaining of a demurrer;

(c) From an order granting a new trial;

(d) From an order arresting judgment;

(e) From any order made after judgment affecting the substantial rights of the people.

2. By the defendant:

(a) From a final judgment of conviction; a sentence shall be deemed to be a final judgment within the meaning of this section; upon appeal from a final judgment or an order granting probation of the court may review any order denying a motion for a new trial, except when an appeal from an order denying a motion for a new trial has previously been finally determined

in cases where the defendant has been committed for sexual psychopathy, insanity, or narcotics addiction;

(b) From any order made after judgment affecting his substantial rights;

(c) From an order denying a motion for a new trial in cases where the defendant is committed before final judgment for sexual psychopathy, insanity, or narcotics addiction; such an appeal shall be dismissed if while it is pending an appeal is taken under subdivision (a) or (d);

(d) From an order granting or denying probation.

Constitution of the State of California, Article VI §4, 4b, 5.

§4. *Supreme Court; jurisdiction*

Sec. 4. The Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in municipal or justices' courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; the said court shall also have appellate jurisdiction in all cases, matters and proceedings, pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have

power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any District Court of Appeal, or before any justice thereof, or before any Superior Court in the State, or before any judge thereof.

§4b *District Courts of Appeal; jurisdiction.*

Sec. 4b. The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the superior courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in municipal, or in justices' or other inferior courts); in proceedings in insolvency; in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition, usurpation of office, removal from office, contesting elections, eminent domain, and in such other special proceedings as may be provided by law; also, on questions of law alone, in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered.

The said courts shall also have appellate jurisdiction in all cases, matters and proceedings pending before the Supreme Court which shall be ordered by the Supreme Court to be transferred to a District Court of Appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the justices thereof shall have power to issue writs of habeas corpus to any part

of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the District Court of Appeal of his district, or before any superior court within his district, or before any judge thereof.

§5. *Superior courts; municipal courts; justice courts;* jurisdiction; days open; process; judge *pro tempore*

Sec. 5. The superior courts shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices or other inferior courts); in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; and of all such special cases and proceedings as are not otherwise provided for; and said court shall have the power of naturalization and to issue papers therefor.

The superior courts shall have appellate jurisdiction in such cases arising in municipal and in justices' and other inferior courts in their respective counties or cities and counties as may be prescribed by law. The Legislature may, in addition to any other appellate jurisdiction of the superior courts, also provide for the establishment of appellate departments of the superior court in any county or city and county wherein any municipal court is established, and for the constitution, regulation, jurisdiction, government and procedure of such appellate departments. Superior courts, municipal courts and justices' courts in cities having a population of more than 40,000 inhabitants shall always be open, legal holidays and nonjudicial days excepted. The process of superior courts shall extend to all parts of the

State; provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions is situated. Said superior courts, and their judges shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus on petition by or on behalf of any person in actual custody, in their respective counties. Injunctions and writs of prohibition may be issued and served on legal holidays and nonjudicial days. The process of any municipal court shall extend to all parts of the county or city and county in which the city is situated where such court is established, and to such other parts of the State as may be provided by law, and such process may be executed or enforced in such manner as the Legislature shall provide.

Upon stipulation of the parties litigant or their attorneys of record a cause in the superior court or in a municipal court may be tried by a judge pro tempore who must be a member of the bar sworn to try the cause, and who shall be empowered to act in such capacity in the cause tried before him until the final determination thereof. The selection of such judge pro tempore shall be subject to the approval and order of the court in which said cause is pending and shall also be subject to such regulations and orders as may be prescribed by Judicial Council.

APPENDIX "E."

Defendants' Designation of Record on Appeal, and Statement on Appeal.

In the Municipal Court, Southern Judicial District, County of San Mateo, State of California.

The People of the State of California, Plaintiff, vs. Sam Ratner and Gary Clarence Morton, Defendants. No. 62 M 52

Come Now the defendants, Sam Ratner and Gary Clarence Morton, and, pursuant to Rules 183 and 184 of the California Judicial Council Rules on Appeal from Municipal Courts in Criminal Cases, hereby designate the record and file their statement on appeal.

Designation of Record on Appeal:

1. Complaint
2. Clerk's Transcript
3. The Jury Verdict
4. Judgment of the Court
5. Notice of Appeal filed July 28, 1964
6. All exhibits of plaintiff and defendants, received in evidence, particularly but not limited to People's Exhibit #2, an 8 mm. film entitled "Honey Bee," and defendants' Exhibit #50, 8 mm. film entitled "White Fury."
7. This statement on appeal.

Statement on Appeal

The grounds upon which defendants rely:

I

The motion picture film "Honey Bee," upon which defendants were convicted in Count Five of the complaint, is not obscene as a matter of law, but rather is constitutionally protected material.

Dated: November 23, 1964.

Atkins & Jacobson

By Burton C. Jacobson

Attorneys for Defendants

EXHIBIT "F."

Appellants' Opening Brief.

Appellate Department of the Superior Court, in and for the State of California, County of San Mateo.

The People of the State of California, Plaintiff & Respondent, vs. Sam Ratner, and Gary Clarence Morton, Defendants & Appellants. On Appeal—Criminal Ad No. 209 Municipal Court, Southern District.

INTRODUCTION

This is an appeal by the appellants from a conviction on Count No. V of a five count complaint after jury verdict, which verdict was returned on July 7, 1964, and judgment on which was entered on July 21, 1964, in the above designated case in the Municipal Court, Southern Judicial District, County of San Mateo, State of California, Case No. 62 M 52, styled "The People of the State of California, Plaintiff, vs. Sam Ratner and Gary Clarence Morton, Defendants."

The appellants did timely file their notice of appeal and designate their record on appeal, and on December 17, 1964, the record on appeal was filed in the Appellate Department of this Honorable Court.

APPELLANTS' CONTENTION

It is the appellants' contention that their conviction on Count No. V of the complaint in the Municipal Court, Southern Judicial District, County of San Mateo, Case No. 62 M 52, should be reversed upon the ground that the motion picture film entitled "Honey Bee," upon which Count No. V was based, is not obscene as a matter of law, but rather is constitutionally protected material.

POINTS AND AUTHORITIES

I

IT IS THE PRESENT DUTY OF THIS COURT TO DETERMINE WHETHER OR NOT THE FILM "HONEY BEE," INVOLVED IN THE INSTANT CASE, IS OBSCENE AS A MATTER OF LAW.

In *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, the Supreme Court of the State of California held, among other important points decided, that the courts must be the final arbiters of the all important issue of law, i.e., is the involved material obscene as a matter of statutory and constitutional construction? At pages 908-909, the court said:

> "Turning to the issue of statutory and constitutional construction which the complaint raises, we believe that this issue must be resolved by this court; it cannot properly be reposed in a jury for final disposition as a question of fact. (11-Footnote) (11. By so holding, we do not wish to be interpreted as sanctioning the impairment of rights traditionally accorded criminal defendants: the right to introduce evidence which tends to disprove the accusation, In re *Harris* (1961), 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P.2d 305, and the right to have the jury determine all relevant issues bearing upon guilt, including the question of whether the material is obscene.),
>
> The crux of our case is whether the definition of obscene matter in Penal Code section 311 sanctions prosecution of sellers of "Tropic of Cancer" and whether the constitutional guarantees of freedom of speech and freedom of the press (U.S.

Const., 1st and 14th Amends.; Cal. Const., art. I, §9) permit such prosecution. As we shall point out in more detail, the courts have long recognized that such questions of statutory and constitutional construction and application call for court decisions; they raise issues, not of the ascertainment of historical fact, but the definition of statutory proscription and constitutional protection; *the court itself must determine the law of the case for the sake of consistent interpretation of the statute and uniform determination of whether particular matter is obscene.*" (Emphasis added)

Zeitlin also cites and approves (pp. 910-911) §251.4-(4) of the Proposed Official Draft of the Model Penal Code (1962) which provides in part. "The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene."

On two occasions (see *Manual Enterprises, Inc. v. Day,* 82 S.Ct. 1432, 1437, and *Jacobellis v. Ohio,* 84 S.Ct. 1676, 1682, Footnote 10), the Supreme Court cited with approval a Law Review article by two professors, Messrs. Lockhart and McClure, entitled Censorship of Obscenity; The Developing Constitutional Standards, 45 Minn. L.R. 5. On this point these reviewers say (p. 114):

"In our opinion, an independent review of the questioned material to determine whether it is 'obscene' within the constitutional requirements is now the obligation of every judge and appellate court before whom the constitutional issue is raised, subject to ultimate review in appropriate cases by the Supreme Court."

Federal courts have been assuming and discharging this duty of initial determination of the question of obscenity or non-obscenity on Motions to Dismiss Indictments. Both of the cases hereafter cited resulted in findings of non-obscenity and dismissal of the indictments involved in each case. See *United States v. Linetsky* (U.S.D.C., East.Dist. of Mich.), ...Fed. Supp....., CR No. 39798, Memorandum Opinion 5/28/64, and also see *United States v. Frew* (U.S.D.C., East. Dist. of Mich.), CR No. 39714, Memorandum Opinion 7/-17/63.

On September 14, 1964, the Appellate Department of the Superior Court for Los Angeles County applied the principles of *Zeitlin,* and held that a trial court, as well as an appellate court, has jurisdiction to decide, as a matter of law, that given material is not obscene (*People v. Bruce,* CR A 5912). It is also interesting to note that *Zeitlin* was cited with approval no less than three times by the United States Supreme Court in *Jacobellis v. Ohio,* 84 S. Ct. 1676, 1676, 1679-1680.

Therefore it is respectfully submitted that it is the present duty of this Court to determine whether or not the film involved in the instant case is obscene as a matter of law.

II

THE MOTION PICTURE FILM ENTITLED "HONEY BEE" INVOLVED IN THE INSTANT CASE IS NOT OBSCENE AS A MATTER OF LAW, BUT RATHER IS CONSTITUTIONALLY PROTECTED MATERIAL.

Penal Code §311.2 proscribes only obscene matter. If the underlying matter is not obscene, then no matter

what else it might be, no crime has been committed and the material is then protected by the First Amendment to the Constitution of the United States and Article I, §9 of the Constitution of the State of California.

The California Supreme Court in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, held, basing its decision on *Roth v. United States,* 354 U.S. 476, and cases following it, that only that which is designated as "hard-core pornography" falls outside of the constitutional protection. In *Zeitlin,* the court made this pronouncement twice:

> "This decision and others of the United States Supreme Court, we think, impliedly draw a line of constitutional protection around all material except that which has been described as hard-core pornography." (pp. 911-912).

and again:

> "By employing the term 'utterly' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance. The only material that falls into the latter category is hard-core pornography." (p. 920).

What then, is hard-core pornography? The term had its genesis in *Roth.* It was first used by the Solicitor General of the United States where he described hard-core pornography as follows: (Brief for the United States, pp. 37-38, *United States v. Roth,* 354 U.S. 476 [1957]):

> "This is commercially produced material in obvious violation of present law. . . . This material

is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to portray the material in pseudo-scientific or 'arty' terms. The production is plainly 'hard-core' pornography, of the most explicit variety, devoid of any disguise.

"Some of this pornography consists of erotic objects. There are also large numbers of black and white photographs, individually, in sets, and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets or books, illustrated with such photographs, which consist of stories in simple, explicit words of sexual excesses of every kind, over and over again. No one would suggest that they had the slightest literary merit or were intended to have any. There are also large numbers of 'comic books', specially drawn for the pornographic trade, which are likewise devoted to explicitly illustrate incidents of sexual activity, normal or perverted. . . . It may safely be said that most, if not all, of this type of booklets contain drawing not only of normal fornication but also of perversions of various kinds.

"The worst of the 'hard-core' pornographic materials now being circulated are the motion picture films. *These films,* sometimes of high technical quality, sometimes in color, *show people of both sexes engaged in orgies which again include every form of sexual activity known,* all of which are presented in a favorable light. The impact of these pictures on the viewer cannot easily be imag-

ined. No form of incitement to action or to excitation could be more explicit or more effective." (Emphasis added)

Thus, in adopting and employing the term "hard-core" pornography, the Supreme Court of the United States in *Roth* impliedly adopted the description given it by the Solicitor General himself. The hard-core pornography test, as outlined, was confirmed (see *Zeitlin v. Arnebergh,* supra, pp. 914-915, where Justice Tobriner so concludes) by several U. S. Supreme Court decisions decided after *Roth. Times Film Corp. v. Chicago,* 355 U.S. 35, 78 S. Ct. 115; *One, Inc. v. Olesen,* 355 U.S. 371, 78 S.Ct. 364; and *Sunshine Book Co. v. Summerfield,* 355 U.S. 372, 78 S.Ct. 365. Also see the concurring opinion of Mr. Justice Stewart in *Jacobellis v. Ohio,* 84 S.Ct. 1676, at p. 1683, where Mr. Justice Stewart says:

> "I have reached the conclusion, which I think is confirmed at least by negative implication in the court's decisions since *Roth* and *Alberts,* that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography."

It is strongly urged that if the motion picture film "Honey Bee", which is the subject matter of the instant case, is compared with the description of hard-core pornography enunciated by the Solicitor General in *Roth* and adopted by the Supreme Court in that decision and in its subsequent cases, supra, it is manifest that the instant film is not hard-core pornography. If the film is not hard-core pornography, then it is not "obscene" and hence, appellants have committed no violation of §311.2 of the Penal Code of which they

stand convicted. If the material herein involved is not obscene as a matter of law, no jury or any body or court could have reasonable or probable cause, or any cause, to believe it to be obscene. The findings of obscenity are, as Mr. Justice Tobriner tells us in *Zeitlin* (p. 910), "a constitutional fact".

It is most important to note that in every matter coming before the United States Supreme Court since its decision in *Roth,* wherein the United States Supreme Court has granted certiorari or noted probable jurisdiction, the finding or judgment of obscenity has been reversed or upset. (*One, Inc. v. Olesen,* 355 U.S. 371; *Times Film Corp. v. Chicago,* 355 U.S. 35; *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; *Kinglsey International Pictures Corp. v. Regents,* 360 U.S. 684; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478; *Jacobellis v. Ohio,* 84 S.Ct. 1766; *Tralins v. Gerstein,* 84 S.Ct. 1903; and *Grove Press v. Gerstein,* 84 S. Ct. 190).

The undeviating path of these decisions indicates that the court clearly meant what it said in *Roth* about "keeping the door tightly closed and opened only the slightest crack." (*Roth v. United States,* 354 U.S. 476, at 488)

CONCLUSION

Wherefore, on the basis of the foregoing points and authorities, it is respectfully submitted:

1. That it is the present duty of this Court to determine whether or not the film "Honey Bee" involved in the instant case is obscene as a matter of law; and

2. That the motion picture film "Honey Bee", upon which the defendants were convicted in Count No. V

of the complaint, is not obscene as a matter of law, but rather is constitutionally protected material.

Dated: December 22, 1964.

Respectfully submitted,

Atkins & Jacobson

By Burton C. Jacobson

Attorneys for Defendants and Appellants

APPENDIX "G."

In the Superior Court of the State of California for the County of San Mateo, Appellate Division.

The People of the State of California, Plaintiff and Respondent, vs. Sam Ratner and Gary Clarence Morton, Defendants and Appellants. On Appeal—Criminal No. AD 209

1. Petition for Rehearing

2. Application for Certification to the District Court of Appeals.

3. Points and Authorities in Support of Petition for Rehearing and Application for Certification to the District Court of Appeals.

4. Declaration of Burton C. Jacobson in Support of Petition for Rehearing and Application for Certification to the District Court of Appeals.

PETITION FOR REHEARING

To the Honorable Judges of the Appellate Division in the Superior Court of the State of California, County of San Mateo:

Defendants and appellants, SAM RATNER and GARY CLARENCE MORTON, present their petition for a rehearing of the above cause, and, in support thereof, respectfully show:

1. The appeal in the cause was argued before this court on January 28, 1965.

2. On March 31, 1965, this court rendered its decision in favor of the plaintiff and respondent and against the defendants and appellants, confirming the judgment of the Municipal Court, Southern Judicial District, County of San Mateo, State of California.

3. The defendants and appellants seek a rehearing upon the following grounds:

a. This court erred by applying an incorrect test of obscenity.

b. This court erred in finding the motion picture film "HONEY BEE" to be obscene and to be hard core pornography.

For the foregoing reasons, it is urged that this petition be granted.

Dated: April 5, 1965

Respectfully submitted,
Atkins & Jacobson
By Burton C. Jacobson
Attorneys for Defendants
and Appellants.

APPLICATION FOR CERTIFICATION TO THE DISTRICT COURT OF APPEALS

To the Honorable Judges of the Appellate Division in the Superior Court of the State of California, County of San Mateo:

Defendants and appellants, SAM RATNER and GARY CLARENCE MORTON, present this application for certification to the District Court of Appeals of the above cause upon the follow grounds:

(a) The transfer of the instant case is necessary to secure uniformity of decision in that this court's memorandum decision filed March 31, 1965 is contrary to the law of the State of California as expressed in ***Zeitlin v. Arnebergh,*** 59 Cal. 2d 901; is contrary to the test of obscenity as contained in the Penal Code

of the State of California, §311 (a); and is contrary to the law of the United States of America as expressed in *Roth v. United States*, 354 U.S. 386; *One, Inc. v. Olesen*, 355 U.S. 371; *Times Film Corp. v. Chicago*, 355 U.S. 35; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372; *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Jacobellis v. Ohio*, 84 S.Ct. 1676; *Tralins v. Gerstein*, 84 S.Ct. 1903; *Grove Press v. Gerstein*, 84 S.Ct. 190; *Winters v. New York*, 68 S.Ct. 665, and *Burstyn, Inc. v. Wilson*, 72 S.Ct. 777.

(b) To settle important questions of law involving the constitutional guarantees of freedom of speech and expression as contained in the United States Constitution, First and Fourteenth Amendments and the California Constitution, Article One §9.

(1) Under the rule of law laid down in *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, that only "hard core pornography" is proscribed, what material is embraced within the term "hard core pornography"?

(2) Does the motion picture involved herein, to wit; the film entitled "Honey Bee" fall within definition of the phrase "hard core pornography"?

(3) What is the proper method of application of the definition of obscenity as contained in §311 (a) of the Penal Code of the State of California?

For the foregoing reasons, it is urged that this application be granted.

Dated: April 5, 1965

Respectfully submitted,
Atkins & Jacobson
By Burton C. Jacobson
Attorneys for Defendants
and Appellants.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING AND IN SUPPORT OF APPLICATION FOR CERTIFICATION TO DISTRICT COURT OF APPEALS

I

THIS COURT IN ITS MEMORANDUM DECISION IN THE INSTANT CASE EMPLOYED AN ERRONEOUS AND INCORRECT TEST OF OBSCENITY.

The correct test for definition of obscenity applicable to the courts of the State of California is contained in §311 (a) of the Penal Code of the State of California, and is as follows:

> "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or execretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

This court's memorandum decision at page 2, commencing on line 19 thereof, states the test to be "that the test is whether the subject material is hardcore pornography utterly without redeeming social importance."

A comparison of the definition contained in §311 (a) of the Penal Code and of that definition used by this court will immediately point out that this court applied an erroneous test of obscenity. This is so because the test applied by this court does not contain

all of the elements requisite to a finding of obscenity as stated in the Penal Code.

Before any material may be legally proscribed or suppressed *all* of the various elements contained in the definition of obscenity must coalesce and be met. These elements are as follows:

(1) The material must be tested by "the average person".

(2) The average person must test the material by applying "contemporary standards".

(3) The material must be tested by its "predominant appeal".

(4) The predominant appeal of the material must be "taken as a whole" and not part by part.

(5) The said predominant appeal of the material taken as a whole must be to "prurient interest" as defined in §311 (a) of the Penal Code.

(6) The description or representation of such matter must go "substantially beyond customary limits of candor".

(7) Last but not least, the matter must also be *utterly* without redeeming social importance.

If the material under consideration does not meet *all* of these elements then that material may not be declared obscene and proscribed.

Roth v. United States, 354 U.S. 386; *Manual Enterprises, Inc. v. Day*, 82 S.Ct. 1432; p. 1436-1437.

II

WHAT MATERIAL IS "HARD CORE PORNOGRAPHY"?

The term "hard core pornography" embraces only that material which is determined to be obscene only

after it meets *all* of the elements of the test of obscenity as contained in §311 (a) of the Penal Code of the State of California.

Zeitlin v. Arnebergh, 59 Cal. 2d 901; *Roth v. United States,* supra; *Manual Enterprises, Inc. v. Day,* supra.

Defendants and appellants contend that the only material which may be classified as "hard core pornography" is material which fits the description given it by the Solicitor General of the United States in his brief in the *Roth* case (Brief for the United States, p. 37-38) which is quoted in appellants' opening brief, commencing on page 5, line 23, and continuing through line 24 of page 6.

III

THE MOTION PICTURE FILM "HONEY BEE" CANNOT BE CONSIDERED HARD CORE PORNOGRAPHY AND IS NOT OBSCENE AS A MATTER OF LAW.

Appellants contend that the most that can be said about the motion picture "Honey Bee" is that it is the portrayal of the female nude assuming various modeling poses.

Nudity, per se, is not obscenity.

Parmelee v. United States, 113 Fed. 2d 729, 732-734; *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; *Mounce v. United States,* 355 U.S. *Manual Enterprises, Inc. v. Day,* 82 S.Ct. 1432.

Material which is entertaining or amusing has redeeming social importance.

Winters v. New York, 68 S.Ct. 665; *Burstyn, Inc. v. Wilson,* 72 S. Ct. 777.

Who can say that "Honey Bee" is not entertaining and amusing to a great segment of our population? Aside from this element, appellants contend that the film "Honey Bee" does not meet even one of the elements necessary for a finding of obscenity as outlined in §311 (a) of the Penal Code.

IV

THE QUESTIONS OF LAW INVOLVED IN THE INSTANT CASE ARE OF GREAT IMPORTANCE AND INVOLVE THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION AND SPEECH AS CONTAINED IN AMENDMENTS ONE AND FOURTEEN OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE §1 OF THE CALIFORNIA STATE CONSTITUTION.

No authority is needed for the basic proposition that constitutionally guaranteed freedoms are matters of utmost importance.

Since the decision by the United States Supreme Court in Roth in 1957, the courts of this country and of this state have wrestled with the problem of what material fell within the definition of obscenity as outlined in *Roth*. Cases came up holding that nudity per se were not obscenity. Cases came up holding that sex per se was not obscenity. Finally, in our own state, in the *Zeitlin* decision, the Supreme Court of California identified obscene material as being only that which is "hard core pornography". This now leaves us to wrestle with what is hard core pornography. What exact material is proscribed as being obscene and not entitled to the protection of the First and Fourteenth Amend-

ments of the Constitution of the United States and Article One §9 of the California State Constitution.

In *Jacobelis v. Ohio,* 84 S. Ct. 1676, Mr. Justice Stewart only in a concurring opinion commencing at page 1683 makes the following statement: "I have reached the conclusion which I think is confirmed at least by negative implication in the court's decisions since *Roth* and *Alberts,* that under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to hard core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion-picture involved in this case is not that prurient".

Although Appellants understand that at the time this case originally came before the Appellate Division that Justice Stewart's opinion was that of only one Justice of the United States Supreme Court, they felt that they understood Justice Stewart by his phrase "I know it when I see it" to mean that material which is so base and so vile as described by the Solicitor General in his brief to the Supreme Court in *Roth* so as to be material which no one could disagree about. However, the Honorable Judges of the Appellate Division of the Superior Court of the State of California, County of San Mateo, in the instant case, have raised the phrase enunciated by one Justice in a concurring opinion to that status of being test to be applied in an obscenity case; and have applied it to a film which we contend there is a great deal of disagreement about because in comparing the film "Honey Bee" involved herein to the description talked about by the Solicitor General in his brief in the

Roth case, and comparing it to the material involved in all of the other cases going to the United States Supreme Court and to the California Courts, we deem it to be so innocuous and inoffensive by comparison that we feel a most important question in a most sensitive area of law must be determined by a higher tribunal.

Dated: April 5, 1965

Respectfully submitted,
By Burton C. Jacobson
Attorneys for Defendants
and Appellants

DECLARATION OF BURTON C. JACOBSON IN SUPPORT OF PETITION FOR REHEARING AND APPLICATION FOR CERTIFICATION TO THE DISTRICT COURT OF APPEALS

Burton C. Jacobson declares that he is an attorney-at-law licensed to practice before all courts of the State of California, and that he is one of the attorneys for defendants and appellants, SAM RATNER and GARY CLARENCE MORTON.

He hereby certifies that the foregoing petition for rehearing and application for certification to the District Court of Appeals is submitted in good faith and not for purposes of delay.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 5, 1965

Burton C. Jacobson